No. 20273

In the

United States Court of Appeals

For the Ninth Circuit

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, a corporation,
Appellant,

v.

PACIFIC INLAND NAVIGATION COMPANY, INC., a corporation, as successor to Inland Navigation Company,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I

COUNTER-STATEMENT OF CASE BY APPELLEE

This is a civil action brought by appellee to recover from appellant amounts which appellee has been obliged to expend to defend and to satisfy a judgment covering its liability to the Port of Pasco.

The background of this case may be found in decision of this Court on a prior appeal involving appellee's third party liability and the limitation of liability proceedings which it brought thereon. *Port of Pasco v.*

Pacific Inland Navigation Company, (CA 9, 1963) 324 F.2d 593, (Docket No. 18644 herein).

Damages to the Port of Pasco dock were caused by an explosion and fire originating on a barge of appellee's predecessor while unloading bulk gasoline at the Pasco dock. Appellant refused repeated tenders of the defense of action brought by the Port of Pasco against appellee for the dock damages and tender of the limitation of liability proceedings (Pretrial Order Admitted Fact 17, R. 33-34).

The liability of appellee to the Port of Pasco based upon the court judgment for $55,464 was limited to the sum of $3,692.16 under the Federal Limitation of Liability Act, 46 U.S.C. §183-185, after trial and appeal to this Court.

In this civil action appellee seeks recovery of the amount of its limited liability, plus total legal costs of the two prior actions and the appeal. Appellant has agreed that these litigation expenses in the sum of $14,372.09 are reasonable in amount and were necessarily incurred by and on behalf of appellee (Pretrial Order Admitted Fact 19, R. 36). The total amount of the judgment as entered by the Court below is the sum of $18,359.61, including interest on the above amounts (R. 76-77).

The basis of appellee's claim against appellant is a policy of liability insurance issued by appellant (Ex. A) and particularly the liability coverage on non-self-

propelled vessels (such as the barge involved in the explosion and Pasco dock fire) which was specifically provided for under Endorsement 23 on said policy.

The Court below first ruled in a preliminary way that there was no ambiguity in the insurance policy and hence no basis for allowing parol evidence to be admitted to show the intention and understanding of the parties as to coverage provided (R. 53). After the first stage of the trial the Court below rendered its Oral Decision finding that coverage was provided under Endorsement 23, when read together with the other provisions in appellant's policy (Tr. 55).

As a precaution, the Court below then went on to hold that if the appellate court disagreed with its interpretation of coverage provided by the policy, then an ambiguity existed, justifying reception of parol evidence (Tr. 55-56). At the request of appellant the trial was reopened to allow both parties to offer parol evidence. Thereafter, the Court again ruled in appellee's favor on construction of the policy terms, but found further on the basis of the parol evidence that it was the intention of the parties to provide coverage for third party liability risks of the type described above (Memorandum Decision at R. 58 and Findings of Fact 18 at R. 69). This appeal followed.

II
ARGUMENT IN SUPPORT OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

A. Preliminary Statement

This Court should not disturb the findings of fact by the District Court unless such findings are clearly erro-

neous. The burden of proving that such findings are clearly erroneous is upon appellant. Thus, in the *PACIFIC QUEEN*, (CA 9, 1962) 307 F.2d 700 this Court stated:

> "* * * it is not incumbent upon *appellees* to persuade this court that the District Court's findings of fact are correct; on the contrary, the *appellants* must 'persuade this court that the District Court's findings of fact are, as specified by appellants, clearly erroneous'."
>
> *PACIFIC QUEEN*, 307 F.2d 700, 706.

This Court has established certain guidelines or rules to be applied in testing the adequacy and accuracy of District Court findings in civil cases:

1. Such findings will not be disturbed unless they are clearly erroneous, regardless of what decision this Court might reach if it had initially evaluated the same evidence. *Puget Sound Pulp and Timber Co. v. O'Reilly*, (CA 9, 1956) 239 F.2d 607, 609.

2. Due regard must be given to the opportunity of the District Court to judge the credibility of witnesses and the evidence. *Gypsum Carrier, Inc. v. Handelsman*, (CA 9, 1962) 307 F.2d 525, 529.

3. This Court must view the evidence in the light most favorable to the prevailing party. *Axelbank v. Rony*, (CA 9, 1960) 277 F.2d 314, 316.

4. Appellee, as the party prevailing below, must be given the benefit of all inferences that may be reason-

ably drawn from the evidence. *PACIFIC QUEEN*, (CA 9, 1962) 307 F.2d 700, 706.

B. Record and Transcript References in Support of Findings of Fact

Notwithstanding the above rules or guidelines, but in compliance with provisions of Rule 18 (3) of this Court, we enumerate herewith record references to specific evidence supporting the Findings of Fact which have been challenged by appellant in its Specifications of Error.

SPECIFICATION OF ERROR No. 1 relates to Findings of Fact 7 insofar as it found that the Port of Pasco dock was not "leased" to appellee's predecessor (R. 65).

The leases speak for themselves (Exs. C to F and see Stipulation as to Record on Appeal § 9 and following at R. 83-84). These leases covered certain specifically described areas consisting of the tank farm located across the road from the Port of Pasco dock which was involved in this fire. For this reason, Admitted Facts 6-9 in the Pretrial Order recite ownership of the dock by Port of Pasco and lease of tank farm facilities across the street from the dock by appellee's predecessors (R. 29-31).

Witness Light expressly testified that there was no lease on the dock (Tr. 43, l.10 to 15) and described the *tank farm areas* which were leased from the Port of Pasco (Tr. 15, l.9 to 18, l.4). Witness Walls testified to the same effect (Tr. 88 l. 23 to 24).

The Manager of the Port of Pasco stated that the leases in effect with appellee's predecessor covered area "occupied by the tank farm only and does not include any area of the dock site" (Ex. K). The Port of Pasco provided fire protection, maintenance and fire insurance on its dock (Tr. 35, 1.19 to 36, 1.7) while appellee's predecessor provided similar services and insurance protection on the leased tank farm facilities as the leases expressly required (Ex. C, R. 83-84, Ex. K and Tr. 89).

SPECIFICATION OF ERROR No. 2 again relates to Finding of Fact 7 where the Court below determined that the use of the Port of Pasco dock was a "non-exclusive use" (R. 65).

Admitted Fact 7 in the Pretrial Order states *inter alia:*

> "The use of the Port of Pasco dock by plaintiff and its predecessor * * * was a non-exclusive use * * *." (R. 29-30)

The manager of the Port of Pasco stated that its dock facilities were used on a "non-exclusive basis" (Ex. K).

Additional support for this finding can be found throughout the testimony of witnesses Light and Walls (See particularly Tr. 36, 1.10 to 13 and 1.22 to 25, and Tr. 111, 1.2 to 11).

Furthermore, the explicit language of the leases (Exs. C to F) was to the effect that use of the dock by appellee's predecessor "shall not be exclusive to the company

(lessee)" (See § 9 and following in Stipulation as to Record on Appeal, R. 83-84).

SPECIFICATION OF ERROR No. 3 relates to Finding of Fact 18 and the understanding and intention of the parties with regard to Exclusion (f) in appellant's basic printed Comprehensive Liability Policy (Ex. A) when considered as a part of the entire policy and its endorsements (R. 69).

Witness Walls, who was handling insurance matters for appellee's predecessor, testified that Endorsement 23 was insisted upon and eventually added to the policy to cover third party liability risks such as are involved in the Port of Pasco damage claim and suits (Tr. 87, 1.17 to 88, 1.4). He was never advised by appellant's representatives that the policy with its endorsements would not cover such risks (Tr. 91, 1.19 to 25). The broad scope of Endorsement 23 was not intended to be limited by printed Exclusion (f) in the basic policy (Tr. 115, 1.24 to 116, 1.8). Exclusion (f) was regarded by Walls as not affecting the specific coverage in unrestricted terms on loading and unloading of non-self-propelled water craft that was provided by Endorsement 23 when added to the policy (Tr. 118, 1.1 to 8, Tr. 108, 1.2 to 8, Tr. 120, 1.19 to 121, 1.10 and Tr. 126, 1.7 to 11).

Appellant's own underwriting representative, Mr. Frederickson, who testified at the trial, admitted that Endorsement 23 to the policy spoke in positive and

specific terms to provide coverage on risks of unloading water craft and that "the wording does not have any limitation built into the paragraph as such" (Tr. 158, 1.6 to 15).

Elsewhere in his testimony Frederickson stated:

> "We did agree readily to provide liability insurance coverage for non-self-propelled vessels * * *." (Tr. 155, 1.22 to 24)

Barge 535 as involved in the Port of Pasco dock fire was this type of vessel (Admitted Fact 4, R. 29). The fire damage to the dock and ensuing litigation involved the liability of appellee and its predecessor to a third party (Admitted Fact 17, R. 33-34). *Port of Pasco v. Pacific Inland Navigation Co.*, (CA 9, 1963) 324 F.2d 593.

III

ARGUMENT IN SUPPORT OF CONCLUSIONS

The Court below concluded that Endorsement 23, when considered with all other parts of the policy, provided coverage for third party liability risks arising from the unloading operations on the barge at the Port of Pasco dock. It further determined that Exclusion (f) in the basic printed form of policy related to and excluded from coverage property which would be insurable by appellee under fire insurance policies. This would be in the nature of first party insurance coverage. As the Court below pointed out in its Decision, we are not concerned in this case with first party coverage, but with third party liability risks (R. 59). Hence, Endorse-

ment 23, which is specific and unlimited in its terms, provides liability coverage against risks of damage to property of third persons from enumerated causes, including unloading of gasoline from the non-self-propelled barge of appellee's predecessor.

A. Provisions of an Insurance Policy Are Construed Most Strongly Against the Insurer

This statement is hornbook law. It has been especially applied, however, on any attempt by an insurer to limit or restrict coverage. *St. Paul Mercury Insurance Co. v. Price,* (CA 5, 1964) 329 F.2d 687, 688.

The legal principle of strict construction of exclusionary clauses in insurance policies has been followed by the Washington Supreme Court which has stated that they are to be "very strictly construed" against the insurer. *Labberton v. General Casualty Co.,* (1958) 53 Wn.2d 180, 183; 332 P.2d 250, 252. In another case, the Washington Supreme Court has stated:

> "It is familiar law that exclusionary clauses in insurance policies are construed most strongly against the insurer. If there is room for two constructions—one favorable to the insured and the other in favor of the insurer, the former will be adopted by the court."
> *Brown v. Underwriters at Lloyd's,* (1958) 53 Wn. 2d 142, 152; 332 P.2d 228, 234.

One of the best known text authorities on insurance states:

> "If the insurer intends to limit liability under an

indemnity policy, it must do so in unambiguous terms."

13 *Appleman Insurance Law & Practice*, (1943) § 7481, p. 200.

B. Specific Provisions for Coverage Prevail Over Restrictive Language in a Policy

In determining that there was coverage under an omnibus clause in an aircraft liability policy, notwithstanding apparent limitations on such coverage appearing in an exclusionary clause, the Court of Appeals for the Eighth Circuit has stated:

> "Having affirmatively expressed the coverage in a broad promise to defend and to indemnify, it was incumbent on the company to define the exclusions from that promise in clear terms."
>
> *Insurance Co. of N. A. v. General Aviation Supply Co.*, (CA 8, 1960) 283 F.2d 590, 592.

We submit that appellant failed to expressly limit or restrict the specific coverage which it affirmatively undertook to provide by Endorsement 23.

C. Written or Typed Parts of Policy Control Over Printed Language

This Court has expressed the rule as to an insurance policy as follows:

> "It is a well recognized principle of contracts that where a contract is partly written (or typewritten) and partly printed the written (or typewritten) parts control."
>
> *American Universal Insurance Co. v. Kruse*, (CA 9, 1962) 306 F.2d 661, 665.

In *Independence Indemnity Co. v. W. J. Jones &*

Son, (CA 9, 1933) 64 F.2d 312, a liability insurance policy had been issued to a stevedore contractor which contained an exemption or exclusion as to operation of vehicles in its basic printed form. A typewritten endorsement was added to the policy making the coverage applicable to "any work or operations * * * carried on by the assured." After an accident involving one of the stevedore's jitneys, an injured third party brought suit against the insured stevedore. The insurer declined to defend claiming this particular risk was not covered and relying upon the limitations and exclusionary language in the basic policy. There, as here, the insured was forced to bring suit against the insurer to cover the amounts it had paid to satisfy judgment in the third party litigation, plus expenses and fees. The Court rejected the contentions of the insurer, stating *inter alia:*

> "Thus the printed form of policy expressly contemplates liability for injuries resulting from the work carried on by chauffeurs if properly included by written additions to the policy, but it also contains a printed condition that injuries resulting from the use of the automobile driven by them should not be covered by the terms of the policy. * * * In this situation *the familiar rule is that the typewritten portion of the policy controls the printed form.* * * * This is particularly true where the written provision is contained in *a rider which of itself would dominate in case of irreconcilable provisions.* * * * In the case at bar, the rider covering all other operations conducted by the workmen of the assured necessarily covers the operations of these 'jitneys,' whether classed as automobiles or not. There is thus a flat contradiction between

the two provisions of the policy which calls for an application of the rule giving *dominant effect to the typewritten provisions of the policy.*" (Emphasis added)

Independence Indemnity Co. v. W. J. Jones & Son, (CA 9, 1933) 64 F.2d 312, 315-316.

IV

PAROL EVIDENCE AS ALTERNATIVE METHOD OF FINDING COVERAGE UNDER POLICY

A. General Statement

Appellee maintains its position, as advanced at time of trial, and which the Court below adopted. This is to the effect that Endorsement 23 on the policy (E. A) expressly provides coverage for risks of liability to third parties such as involved in the prior actions. *Port of Pasco v. Pacific Inland Navigation Co., supra.* If this Court should construe the policy otherwise, then it is the position of appellee (as the Court below recognized and agreed) that there is sufficient legal basis for the introduction of parol evidence. Such evidence would be admissible to determine the intention and understanding of the parties to the contract.

This being a diversity case under 28 U.S.C. § 1332, the law of the State of Washington is applicable, since parol evidence is treated as a substantive matter. *RKO Radio Pictures v. Sheridan,* (CA 9, 1952) 195 F.2d 167, 170; *Jackson v. Domschot,* (1952) 40 Wn.2d 30; 239 P.2d 1058; 35 A *Corpus Juris Secundum,* Federal Civil Procedure § 458, p. 676.

In Washington it is well established that it is not necessary to find an ambiguity in a written contract before parol evidence is admissible. *McKennon v. Anderson*, (1956) 49 Wn.2d 55, 61; 298 P.2d 492. Evidence to show the surrounding circumstances may be admitted to explain, but not to vary or contradict, the terms of the contract and to place the court in the same position as the parties at the time of execution of the contract. *Vance v. Ingram*, (1943) 16 Wn.2d 399, 411; 133 P.2d 938, 944.

Of course, where there is in fact an ambiguity in an insurance contract, parol evidence is admissible to show the meaning of the questionable or conflicting language. *Kane v. Order of United Commercial Travellers*, (1940) 3 Wn.2d 355, 359; 100 P.2d 1036, 1038; *Miller v. Penn Mutual Life Insurance Co.*, (1937) 189 Wash. 269; 64 P.2d 1050.

Although the Court below in the present case made alternative Finding of Fact 18 and alternative Conclusion of Law 7 as to an ambiguity and the intention of the parties found from the parol evidence received (R. 69, 74-75), the above authorities indicate an additional ground under the substantive law on parol evidence in the State of Washington justifying the admission of parol evidence and the determination that the Court made thereon; namely, that it was the intention of both appellant and appellee to cover risks of liability for third parties for damage such as here involved by

addition of Endorsement 23 to the basic policy.

V

ANSWER TO APPELLANT'S ARGUMENTS

Much of what has been said heretofore applies to this section of the brief.

More specifically, appellee points out that Endorsement 10 of the policy (Ex. A) as referred to on pages 10, 12 and 20 of Appellant's Brief, was by its very terms limited to certain other specified property and hence not applicable to the Port of Pasco dock. Certain designated properties, either owned or specifically leased by appellee, were named in this endorsement. The fact that the Port of Pasco dock is not included among the properties named in Endorsement 10 rather clearly indicates that both appellee and appellant insurer treated it in an entirely different sense; namely, a property owned by a third party where appellee would be exposed to and should be protected against risks of liability for damage while using the facility.

Cases cited by appellee on the parol evidence question are not in point. *National Indemnity Co. v. Smith Gandy*, (1957) 50 Wn.2d 124; 309 P.2d 742, involves an attempt to incorporate into an insurance contract a telephone conversation and letter which were obviously not made a part of the contract. *Western Casualty Co. v. Harris Petroleum Co.*, (SD Cal., 1963) 220 F.Supp. 952, involved a similar attempt to admit by parol some previous insurance policies and letters. Both of these cases

deal with attempts to vary or change terms of the insurance policies, rather than to determine the intention of the parties and to explain uncertainties, as is true in the present case.

Reference to the Washington statute on insurance policies, R.C.W. 48.18.190 is likewise not pertinent here. The policy in this case includes the endorsements and particularly Endorsement 23. Appellee has not sought to incorporate any other writing into this insurance contract.

VI

CONCLUSION

We submit that the specific provisions of Endorsement 23 clearly indicate that this type of third party liability risk on fire damage, due to unloading of appellee's barge at the Port of Pasco dock, would be covered. In addition, a close reading of the entire basic policy and all endorsements calls for a similar conclusion as to coverage. Finally, and alternatively, any uncertainty as to interpretation of the policy terms has been explained by parol evidence which showed an intention of the parties to insure such risks.

For all of the above reasons the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of the brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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